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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1430

IN THE MATTER

of

The Petition of RED STAR BARGE LINE, INC., as owner, and RED STAR TOWING & TRANSPORTATION COMPANY, as charterer, of the coalboat "Red Star 40", her tackle, apparel, etc., in a cause of limitation of, or exoneration from, liability.

RED STAR BARGE LINE INC., and RED STAR TOWING & TRANSPORTATION COMPANY,

Petitioners,

DOLORES ROSE FORCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioners

INDEX TO PETITION

INDEX TO BRIEF

TABLE OF CASES CITED

TABLE OF STATUTES CITED

TABLE OF AUTHORITIES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Red Star Barge Line, Inc., and Red Star Towing & Transportation Company, respectfully pray for a writ of certiorari to review an order of the United States Circuit Court of Appeals for the Second Circuit, which modified an order of the United States District Court for the Southern District of New York vacating a restraining order in a

limitation of liability proceeding in admiralty and as so modified affirmed the order of said District Court.

By this petition, there is presented to this Court solely a question of law which this Court reviewed and decided 15 years ago and which has never been presented again until the filing of this petition—this, for the reason that all lower courts applied the law, as enunciated by this Court, and thereby gave to a litigant his right as preserved to him by the "saving to suitors clause" (28 U. S. C. A. § 41 [3]) as contrasted with a right conferred upon a litigant by a federal statute, *viz.*, the limitation of liability statute in admiralty (46 U. S. C. A. § 183).

Having seemingly crystallized and set the pattern to be followed in cases wherein "state rights" were to be weighed against "federal rights", all courts have applied the law as enunciated by this Court 15 years ago until the instant decision.

The conflict between "state's rights" and "federal rights" project this petition.

Statement of the Case

Red Star Barge Line, Inc., and Red Star Towing & Transportation Company were owner and charterer respectively of a certain coalboat "Red Star 40" (R. 3). Prior to December 11, 1945, the day of the accident in question, Red Star Towing & Transportation Company had employed one, Arthur Force, as bargee of the "Red Star 40" (R. 4). While the aforesaid barge was being shifted by a tug not owned, operated, chartered, or manned by the petitioners, Arthur Force allegedly sustained personal injuries from which he died (R. 4).

On February 2, 1946, the then attorney for Dolores Rose Force (R. 5) made claim upon the petitioner, Red Star Towing & Transportation Company (R. 4). The alleged

injury and death having occurred without the negligence of the petitioners and without their privity and knowledge (R. 5), they timely (R. 5) filed on June 18, 1946 (R. 1) their petition for limitation of, or exoneration from, liability (R. 3).

In compliance with the General Admiralty Rules and the Admiralty Rules of the District Court for the Southern District of New York, the petitioners filed the usual *ad interim* stipulation for value, in this case in the amount of $7,267 (R. 1), the order of reference to a Special Commissioner for appraisal (R. 1), and the order for issuance of monition, restraining order and direction that claims be filed with the clerk (R. 1). Monition issued on June 20, 1946 (R. 1) and was made returnable Sept. 24, 1946 (R. 1). All intermediate steps to perfect the institution of the proceeding for limitation of, or exoneration from, liability were timely and duly accomplished by the petitioners. Prior to the return day of the monition the claimant, the administratrix of Arthur Force (R. 14), obtained an order extending her time to file claim and answer until October 28, 1946 (R. 1, 26).

Instead of filing claim and answer, the administratrix obtained an order to show cause (R. 12), upon various supporting affidavits (R. 14-22) why the restraining order of Judge Knox of June 19, 1946 (R. 8, 10) should not be modified so as to permit the movant to proceed with her contemplated state court action (R. 16).

The motion of the administratrix came on to be heard before Judge Conger, who, in a memorandum of December 3, 1946 (R. 23), granted the motion to modify the restraining order. In order to remove doubt as to Judge Conger's decision, concerning which there was a seeming ambiguity, the petitioners moved for reargument (R. 24) so that certain conditions would be imposed upon the movant's right to modify the restraining order (R. 24).

Reargument was had in chambers (R. 28) and Judge Conger adhered to his prior determination. Thereupon an order was submitted by respondent and signed by Judge Conger on January 8, 1947 (R. 31) modifying the restraining order of Judge Knox (R. 8-11). In said order of January 8, 1947 (R. 25-31), entered January 9, 1947 in the clerk's office (R. 2), the following provisions were made:

(a) The restraining order previously entered was dissolved (R. 29).

(b) The claimant was permitted to begin, prosecute or proceed with her contemplated actions in New York Supreme Court (R. 29).

(c) The claimant was required to file her proof of claim within fifteen days of the signing of the order (R. 30).

(d) The time of the claimant to answer the petition was extended to forty days after termination of the contemplated state court litigation (R. 30).

(e) The claimant was to concede the correctness of the limitation fund (R. 30).

(f) The petitioners were restrained from taking any further steps in this limitation proceeding (R. 30).

(g) The jurisdiction of the petition to limit liability was reserved to the United States District Court for the Southern District of New York (R. 30).

From said order modifying the restraining order theretofore entered in the limitation proceeding (R. 8-11), the petitioners appealed (R. 36) and filed various assignments of error (R. 34).

The Circuit Court of Appeals, 2nd Circuit, after argument, handed down its decision (R. 39), dated March 31, 1947, which modified the order of the District Court to the extent of requiring the claimant to file in the District

Court a statement waiving any claim of *res judicata* relevant to the issue of limited liability which might, perchance, arise in the state court action, instituted by the claimant after the District Court had modified the restraining order in the limitation of liability proceeding.

This application for a writ of certiorari followed.

Jurisdiction

The jurisdiction of this Court to entertain this Petition and to grant the same is provided by Sections 347(a) and 227 of Title 28 of the United States Code and by Supreme Court Rule 38, par. 5(b).

Questions Presented

(1) Can a restraining order in a limitation of liability proceeding in admiralty be modified by a claimant in a *one-claim case,* thereby allowing the institution of an action in a state court, without exacting from said claimant, *as a condition precedent,* an acknowledged consent which admits the *right* of the petitioners to limit liability in the limitation proceeding.

(2) Which is paramount?—A state created right (N. Y. Dec. Est. Law § 130) or a right conferred upon shipowners by Congress (46 U. S. C. A., § 183).

Opinions Below

The opinion of December 3, 1946 of the United States District Court for the Southern District of New York is not officially reported but appears at page 23 of the record. The opinion of March 31, 1947 of the Circuit Court of Appeals, Second Circuit, is reported at 160 F. (2d) 436 and the same appears at pages 39-43 inclusive of the record.

Reasons Relied Upon for Allowance of the Writ

(1) The decision of the Circuit Court of Appeals is in direct conflict with this Court's decisions in *Langnes* v. *Green*, 282 U. S. 531, and the cognate case of *Ex parte Green*, 286 U. S. 437. Since May 23, 1932, the date of the decision in *Ex parte Green, supra*, the lower federal tribunals have uniformly applied the law as enunciated by this Court in the two *Green* cases. The decision of the Circuit Court of Appeals, 2nd Circuit, in the case at bar, is a complete departure from this Court's holding, rationale, and formulation of a pattern to be followed in *one claim cases* in a limitation of liability proceeding in admiralty.

(2) The decision of the Circuit Court of Appeals, 2nd Circuit, in the case at bar, is directly opposed to the rationale and holding of the Circuit Court of Appeals, 9th Circuit, in *The Helen L*, 109 F. (2d) 884. The conflict between the Circuits highlights the fact that the Circuit Court of Appeals, 9th Circuit, has applied the holding of this Court in *Langnes* v. *Green, supra*, as read with *Ex parte Green, supra*, and has arrived at one result, whereas the Circuit Court of Appeals, 2nd Circuit, arrives at a diametrically opposed result, while contending that it applies the holdings of the *Green* cases, *supra*.

(3) The decision of the Circuit Court of Appeals is by a unanimous court composed of Circuit Judges Swan (writing the opinion), Chase and Frank (R. 39). Said decision is clearly contrary to the language used and the inferences deducible therefrom of Circuit Judge Learned Hand in *W. E. Hedger Transp. Corporation* v. *Gallotta*, 145 F. (2d) 870 and *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 F. (2d) 273, and Circuit Judge Augustus N. Hand in *The Quarrington Court*, 102 F. (2d) 916, cert. denied, 307 U. S. 645. It is patent that the Circuit Judges of the 2nd Circuit, among themselves, have expressed different views in their decisions respecting the question of law presented.

All of the Circuit Judges, sitting in the case at bar, have comprised the complement of the Circuit Court of Appeals, 2nd Circuit, in the other cases heretofore cited, in which views, contrary to the instant one, were expressed. The various District Judges of the Southern and Eastern Districts of New York have applied the law as laid down by this court in the *Green* cases, *supra*. In this connection, see *The Kearny*, 3 F. Supp. 718; *The American Transport*, 23 F. Supp. 583; *The Vera, III*, 24 F. Supp. 421; *The Pelham*, 69 F. Supp. 586.

(4) By this decision, the Circuit Court of Appeals, 2nd Circuit, has rendered ineffective and worthless the provision in *General Admiralty Rule 51*, following § 723 of Title 28 of United States Code, that a court shall "make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims." The power to promulgate Admiralty Rules to regulate the practice in limitation of liability proceedings on the grounds that the subject was "one preeminently of admiralty jurisdiction" is within this and only this Court's power. *Providence & N. Y. S. S. Co. Inc.* v. *Hill Mfg. Co.*, 109 U. S. 578.

If the holding of the Circuit Court of Appeals in the application of the *Green* cases, *supra*, is correct, then clarification should emanate from this Court so that the application of the instant decision by the many District Courts will not result in greater uncertainty. The scope and limits of its application should be enunciated by this Court so that uniformity of decision may be had in maritime causes of action. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.

The instant case is intrinsically of public importance and commends itself for hearing by this Court as it regulates the rights as given to a party by a state legislature (N. Y. Dec. Est. Law § 130) and those given to another

party by the United States Congress (46 U. S. C. A. § 183).

(5) Although this is not a final decision, it is an appeal from an injunction under § 227 of Title 28, U. S. Code. *W. E. Hedger Transp. Corp.* v. *Gallotta,* 145 F. (2d) 870; *Curtis Bay Towing Co.* v. *Tug Kevin Moran,* 159 F. (2d) 273. By the very wording of § 227 of Title 28, U. S. Code, with reference to and incorporation of § 347 of Title 28, U. S. Code, this Court can entertain this petition. Further, the issue presented to this court is "fundamental to the further conduct of the case". *Land* v. *Dollar,* 67 S. Ct. 1009 (Decided April 7, 1947); *United States* v. *General Motors Corp.,* 323 U. S. 373. If the procedure as to the statement of *res judicata,* hereinafter referred to is doubtful, then the paramount federal right (*Benedict on Admiralty,* 6th Edition, Vol. 3, § 491, page 397; *Larsen* v. *Northland Transp. Co.,* 292 U. S. 20) fades into nothingness. Indeed, the correct interpretation of this portion of limitation of liability proceedings is the pivotal point of this and every other limitation proceeding. It projects the age-old story of "state rights" v. "federal rights".

The complete departure of the Circuit Court of Appeals, 2nd Circuit, from the accepted and usual course of judicial proceedings in limitation of liability proceedings under the maritime law, warrants the exercise of this Court's supervision and regulatory powers. *Supreme Court Rule 38, par. 5 (b).*

(6) It is doubtful whether the procedure adopted by the Circuit Court of Appeals, 2nd Circuit, in requiring the claimant to file a statement waiving any claim she might make on the theory of *res judicata,* when she returns, after trial of the state court action, to the limitation proceeding, is a valid and proper procedure. It would appear that this is the very first time that such a procedure has been fostered in admiralty cases of this type. Whether a claimant can say, in advance of any finding by

a jury in a companion state court action, that she will waive certain findings, inherent or otherwise in the jury's verdict, when she returns to the limitation proceedings and retries a certain aspect of the case, *viz.*, the right to limit as being dependent upon the lack of "privity" or "knowledge" on the shipowners' part, is open to doubt. In this connection, the theory of *res judicata* in limitation proceedings as analyzed by this Court in *Larsen* v. *Northland Transp. Co.*, 292 U. S. 20, is to be noted.

In every limitation of liability proceeding hereafter in the 2nd Circuit, it may be necessary for the petitioners therein to appeal each and every case to the Circuit Court of Appeals so that said Court will require a District Court to compel the filing of a statement waiving any claim of *res judicata*. The utter lack of uniformity that may arise in the maritime law in pursuing this arbitrary procedure, points up the desirability of this Court enunciating the salutary procedure to be followed in a case of the type here involved.

Shipping interests at large look to this Court for a delineation of their rights as granted by Congress (46 U. S. C. A. § 183) as contrasted and weighed against the rights given by a state under the "saving to suitors" clause of the statute conferring jurisdiction upon the District Courts of the United States (28 U. S. C. A. § 41 [3]).

Wherefore, this case, it is respectfully submitted, merits the decision of this Court.

Respectfully submitted,

Red Star Barge Line, Inc., and
Red Star Towing & Transportation Company,
Petitioners.

By Edward Ash,
Sidney A. Schwartz,
Proctors for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

FOR THE FIRST TIME IN 15 YEARS, THE LOWER COURTS HAVE COMPLETELY DEPARTED FROM THE PATTERN SET BY THIS COURT IN *LANGNES* v. *GREEN*, 282 U. S. 531 AND *EX PARTE GREEN*, 286 U. S. 437, WHICH REQUIRES A CLAIMANT, IN A ONE CLAIM CASE, IN A LIMITATION OF LIABILITY PROCEEDING, IN ADMIRALTY, TO CONCEDE THE RIGHT OF THE PETITIONERS TO LIMIT THEIR LIABILITY, PRIOR TO ANY MODIFICATION OF A RESTRAINING ORDER IN SAID PROCEEDING.

Solely a question of law is presented by this petition. The question of law is succinctly this—Can a restraining order in a limitation of liability proceeding be modified by a claimant in a one-claim case, thereby allowing the institution of an action in a state court, without exacting from said claimant, as a condition precedent, an acknowledged consent which admits the *right* of the petitioners to limit liability in the limitation proceeding.

After receiving notice of claim (R. 4), the petitioners instituted a proceeding for limitation of, or exoneration from, liability pursuant to sections 183, 184 and 185 of Title 46 of the United States Code, granting limitation of shipowners' liability.

The statutory provisions for limitation of liability should be construed liberally in order to effectuate their beneficent purposes. *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20, 54 S. Ct. 584. No court is better adapted than an admiralty court to administer the relief contemplated by the Limitation of Liability Act. *Norwich Co.* v. *Wright*, 80 U. S. 104. This Court in *Providence & N. Y. S. S. Co., Inc.* v. *Hill Mfg. Co.*, 109 U. S. 578, upheld

its power to promulgate Admiralty Rules to regulate the practice in limitation of liability proceedings on the grounds that the subject was "one pre-eminently of admiralty jurisdiction".

Today, the procedure in limitation of liability proceedings is regulated by *General Admiralty Rules 51-54* and in the Southern District by *Admiralty Rules of the Southern District XXXI to XXXV*. With all of these Rules the petitioners complied in order to come within the protection and coverage of the Limitation of Liability statutes. In the posture of the case at that point, the restraining order, which was signed by Judge Knox (R. 11), was good as against all or any suit or suits. *General Admiralty Rule 51,* following 28 U. S. C. A. § 723.

After the initiation of this limitation of liability proceeding and after the time of the claimant to solely file a claim and answer had been extended (R. 26), she moved by order to show cause to modify the restraining order, contending that she was the only claimant (R. 17-18). Patently, she was attempting to bring herself under the case of *Langnes* v. *Green,* 282 U. S. 531, 51 S. Ct. 243. Let us turn to that decision for a moment.

In the cited case, the owner of a fishing vessel, the Aloha, had instituted a proceeding for limitation of liability in the federal District Court after the institution by Green against the owner, Langnes, of a state court action triable by a jury. A restraining order having been issued, Green filed his claim in the limitation proceeding. He then moved to dissolve the restraining order on the grounds that the state court had jurisdiction of the cause, and since Green was the only possible claimant, Langnes might claim the benefit of limitation of liability in the state court. This motion was denied (2nd column of 51 S. Ct. 244). The case was then tried and at the conclusion of Langnes' testimony, Green moved

to dismiss the petition, which motion was denied (p. 284 of 32 F. (2d)—2nd column). At the conclusion of Green's testimony and upon motion of Langnes the claim of liability was dismissed on the ground that no negligence on the part of Langnes had been shown. *Petition of Langnes,* 32 F. (2d) 284.

On appeal the Circuit Court of Appeals, 9th Circuit, *sub. nom. The Aloha,* 35 F. (2d) 447, reversed the District Court on jurisdictional grounds. In the view the Circuit Court of Appeals took of the question, the petition should have been dismissed for lack of jurisdiction since "it is apparent from the allegations of the pleadings as in this case, or from the evidence that the owner has no right to limit his liability"—this by virtue of the fact that Langnes was the master of the fishing vessel, was on board at the time and was "necessarily in privity with and had knowledge of the conditions".

This Court, having granted certiorari, indicated that two contentions had been raised by Green in the Circuit Court of Appeals, to wit, (a) only one claim was involved and the shipowner should seek his remedy of limitation of liability in the state court and (b) the record disclosed privity and knowledge, which militated against jurisdiction. This Court met the second issue first and held that the contention made thereby did not raise a jurisdictional question and then addressed itself to the proposition of there being only one claim involved. Mr. Justice Sutherland, writing for this Court, then said (p. 247 of 51 S. Ct.):

> "* * * and we do not doubt that, in the exercise of a sound discretion, the District Court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, *retaining,* as a matter of precaution, *the petition for a limitation of liability to be dealt with in the possible but* (*since it*

must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty. The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court. * * *" (Italics supplied.)

In *Ex parte Green,* 286 U. S. 437, this Court, through Mr. Justice Sutherland, restated the factual situation as previously set forth in *Langnes* v. *Green, supra,* and quoted from its prior decision, the text of which we have hitherto set forth. The Court then said (p. 439 of 286 U. S.):

"* * * It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's *right* to a limited liability, and that, *if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case.*

Notwithstanding the foregoing, Green, following the remission of the cause to the state court, put in issue the right of the owner to limited liability, by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge. The matter was properly brought before the federal District Court, and that court held that, *the question of the owner's right to limited liability having been raised, the cause became cognizable only in admiralty,* and that its further prosecution in the state court should be enjoined. In this the District Court was right, and the

> motion for leave to file the petition for writ of mandamus must be denied. * * * (Italics supplied.)

Thus, on May 23, 1932, the date of the decision in *Ex parte Green, supra,* for the very first time, the procedure in limitation of liability proceedings in one-claim cases was crystallized, to wit, if the owner's *right* to limit is challenged, the paramount Federal right dictates admiralty's retention of the entire cause. *Benedict on Admiralty,* 6th Edition, Vol. 3, § 491, page 397; *Larsen* v. *Northland Transp. Co.,* 292 U. S. 20, 54 S. Ct. 584.

The fact that certain benefits have been given to the petitioners by a federal statute should not be frittered away by a unique and bizarre interpretation of the *Green* cases, *supra.* Full and complete justice is to be accorded all party litigants in accordance with their respective rights.

Proceeding upon that theory, it has been the petitioners' position throughout that certain prescribed *conditions precedent* to the dissolution of a restraining order in a limitation proceeding must be met before a claimant can proceed to another forum. It has never been the petitioners' desire to deprive the claimant of her right to a jury trial. The petitioners have only asked that the claimant comply with the requirements laid down by the host of authorities, which stem from *Ex parte Green,* 286 U. S. 437.

Turning to the line of authorities applying the holding of this Court in the two *Green* cases, *supra,* we find the Circuit Court of Appeals, 2nd Circuit, in 1939 reviewing the field of limitation of liability in admiralty and making certain comments with respect to the *Green* cases, *supra.* In writing for a unanimous court, Circuit Judge Augustus N. Hand, in *The Quarrington Court,* 102 F. (2d) 916, cert. denied 307 U. S. 645, said (p. 918):

"It is true that in Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, it was held that a state court should be allowed to determine the amount of damages to be awarded a claimant in a common law action pending in that court at the time a petition to limit liability was filed, but that the determination of the right to limit should remain in the admiralty court *and the claimant should be restrained from continuing the prosecution of the action in the state court if he insisted on putting the owners' right to limit liability in issue.* Ex parte Green, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212." (Italics supplied.)

In 1940, the Circuit Court of Appeals, 9th Circuit, in *The Helen L,* 109 F. (2d) 884, reviewed the *Green* cases and stated (p. 886):

"The case on the merits is controlled by Langnes v. Green, supra. But one claimant appeared in response to the monition and it is not contended that there may be others. *The right to limit liability was conceded. Under these circumstances* a refusal of the admiralty court to permit the claimant to pursue his common law remedy in the state tribunal would have been a clear abuse of discretion. Langnes v. Green, supra; Ex parte Green, supra; § 24 (3) of the Judicial Code, 28 U. S. C. A. § 41 (3)[2]". (Italics supplied.)

And at page 886, it continued thusly:

"We need add only that, after the dissolution of the restraining order, appellee filed in the state

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[2] This statute gives the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

> court a reply *admitting the right of appellant to limit its liability* to the value of the vessel and freight pending. Ex parte Green, supra." (Italics supplied.)

In 1944, the Circuit Court of Appeals, 2nd Circuit, had before it *W. E. Hedger Transp. Corporation* v. *Gallotta,* 145 F. (2d) 870. Again it reviewed the law of limitation of liability and said, through Circuit Court Judge Learned Hand (p. 872):

> "*As soon as Gallotta* (the injured person) *filed his consent to the Hedger Company's right to limit, and also to the determination of the value of the barge in the limitation proceeding,* he was free to prosecute his action to judgment in the state court. Since at that time there was but one claim, and the state court could not be called upon to pass upon any question of limitation, there remained no reason for determining the controversy in the admiralty court. Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520; Ex parte Green, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212; The Quarrington Court, 2 Cir., 102 F. 2d. 916."

It needs no extended discussion nor a play upon semantics to realize that the Circuit Court of Appeals, 2nd Circuit, in the cited case, meant that the claimant was free to prosecute the state court action after he filed his consent in the limitation proceeding. Conversely, if he did not do so, he was restrained.

On January 9, 1947 the Circuit Court of Appeals, 2nd Circuit, through Circuit Judge Learned Hand, in *Curtis Bay Towing Co.* v. *Tug Kevin Moran,* 159 F. (2d) 273, said (p. 275):

> "That decision (White v. Island Transportation Company) has, however, been substantially modified by

Langnes v. Green,[10] and Ex Parte Green,[11] which taken together held that, *so long as the claimant does not challenge the privilege,* the shipowner may not draw an action against him into the admiralty court, when there is only a single claim, even though it be greater than the value of the vessel. *That does indeed presuppose that, if the privilege is challenged, the admiralty court has exclusive jurisdiction to decide the issue, which brings with it all the other issues into that court;* * * *." (Italics supplied.)

The *"privilege"* in the last cited case means the *right to limit liability.* The right to limit, upon certain conditions being met, is the *only privilege* given by the limitation of liability statute.

For the holdings of the District Courts, applying the decisions in the *Green* cases, *supra,* see:

The Kearney, 3 F. Supp. 718;
The American Transport, 23 F. Supp. 583;
The Vera III, 24 F. Supp. 421;
The Pelham, 69 F. Supp. 586.
Petition of Trimount Dredging Company, 1934 A. M. C. 1512.

Against this background of judicial opinion, as a reservoir of procedural and substantive law in limitation of liability proceedings, let us see what the moving papers (R. 12-22), upon which the order in question (R. 25) was entered, show. In the affidavit of the claimant (R. 14) annexed to the order to show cause, the unequivocal statement is made (R. 18):

"I do intend to contest petitioners' right to limitation should that be necessary on the ground that the

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[10] 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520.

[11] 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212.

> 'Red Star # 40' was not seaworthy on December 11, 1945, and upon the further ground that petitioners had not used due diligence to make her seaworthy." (Italics supplied.)

In that stature of the case, with an outstanding challenge to the right of the petitioners herein to limit liability, no modification of the restraining order could be made. The fact that modification and dissolution of the restraining order were made becomes the very stuff of the error committed.

In the Circuit Court of Appeals, the claimant contended that she took no real position as to the petitioners' right to limit in view of the fact that her moving affidavit stated that she intended to contest the petitioners' right to limitation "should that be necessary". (See Circuit Court of Appeals opinion, R. 40.)

The petitioners have always contended that the claimant cannot sit by silent as to her position respecting the petitioners' right to limit and leave the same to conjecture. Nor should she be allowed to toy with the court as to her unevinced mental determinations.

She should follow the well-defined, well-established practice as was followed by the claimant in *W. E. Hedger Transp. Corp.* v. *Gallotta, supra* (wherein claimant admitted the right to limit in his answer and in acknowledged consent—fols. 28 and 55 of Record on Appeal in *Hedger* case) or by the claimant in *The Pelham, supra* (wherein claimant put in issue the right to limit).

She should not be allowed to blow hot and cold. Under the authorities, which have been well-fingered by all courts and dictate the foregoing procedure, she cannot remain non-committal and press her right to go to another forum.

If the law hitherto set forth is properly applied there is nothing to be done in the limitation of liability pro-

ceeding after the modification of the restraining order in a one-claim suit save to determine the value of the vessel after the claimant has recovered his or her judgment in the state court action.

For example, if the law had been properly applied in this proceeding, the claimant would have been ordered to file an acknowledged consent admitting the *right* of the petitioners to limit liability. Thereafter, the claimant would be free to prosecute her action in the state court to determine the liability, if any, of the petitioners. If liability on the part of the petitioners were there found and, if the amount of the judgment were greater than the value of the vessel, as set forth in the *ad interim* stipulation (R. 2), the claimant would then return to the admiralty proceeding to solely have determined the true value of the vessel as found by the Special Commissioner for appraisal (R. 2). The value, as then determined, would be the fund against which the petitioners would limit, as their right to limit would have been conceded theretofore.

If no liability on the part of the petitioners was found to exist, then the limitation proceeding becomes academic.

Assume, *arguendo,* that claimant's contentions are followed, which allow her to proceed to the state court without conceding the right of the petitioners to limit liability. Parenthetically, the claimant has commenced her state court action, which, at the time of the writing of this brief, remains undetermined. We shall assume for the purpose of discussion that the action, which has already been instituted in the state court, is tried. During the course of trial the claimant, as plaintiff, seeks to adduce evidence that the petitioners' officers had been aboard the coalboat in question and had seen the alleged defects complained of. What the plaintiff is then doing is attempting to show that the petitioners, defendants there, had actual knowledge of the defect. In effect then, the plaintiff is ad-

ducing proof which would deprive the owner, etc., of limiting liability under the very wording of 46 U. S. C. A. § 183.

In the stature of the case at that point, how do the petitioners proceed? Do they ask for a continuance of the case until they can move in the District Court for a reinstatement of the injunction or restraining order?

In contrast to this, do they object to the evidence, take exception to the overruling of their objection and then appeal from any final determination to the Appellate Division of the Supreme Court and then perhaps to the Court of Appeals.

Assume further that the jury has found for the plaintiff and that the appeal from said determination to the Appellate Division or to the Court of Appeals goes against the petitioners herein, we then come back to the limitation of liability proceeding.

In said proceeding, it may then be argued and contended by the claimant herein that inherent in the determination of the jury in the state court action is the finding that the petitioners through their officers had actual knowledge of the defect. It may then be argued by the claimant that the right to limit has been disposed of in the state court by the inherent finding in the jury's verdict that the defective condition, complained of, was actually known to the corporation, through its officers. Whether the District Court, sitting as an Admiralty Court, will determine said contentions against the petitioners is to indulge in speculation. It may well be that the District Court, trying the limitation proceeding, will not fly in the face of the possible findings already made by a fact-finding tribunal, the jury.

It takes no great stretch of the imagination to realize that, if the District Court holds that the right to limit is bound up in the jury's verdict, the reservation to the Dis-

trict Court of the right to determine limitation, as was done in this case, is a right in a vacuum. It necessarily follows then that such being the District Court's determination, outlined heretofore, the limitation proceeding, the rights and liabilities of the parties have been determined by a jury and not by the Admiralty Court.

To avoid this result, the Circuit Court of Appeals modified the order of the District Court so as to require the claimant to file a statement waiving any claim of *res judicata* (R. 43). It may subsequently be argued by claimant that it is difficult to see how a person can validly waive a claim of *res judicata* which determination is peculiarly within the province and function of the court. *Larsen* v. *Northland Transp. Co.* 292 U. S. 20.

Therefore, to avoid these kindred situations and the confusion that would attend them, the cases cited heretofore, projected by *Ex parte Green, supra,* have held that, as a *condition precedent* to any modification of the restraining order in a limitation proceeding, there be exacted an acknowledged consent to the *right* of the petitioners to limit liability.

The road signs, which have been handed down through the years in limitation of liability proceedings, can lead to only one conclusion in this case. Fundamental conceptualistic error was committed by the courts below.

Wherefore, it is respectfully submitted that this case is one calling for the granting of a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

Edward Ash,
Sidney A. Schwartz,
Proctors for Petitioners.